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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HARRIET RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; PIONEER BANK,
Respondents.

ALBERT RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; MERCANTILE BANK, N.A.; BOATMEN'S BANK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI ADOPT AND APPLY THE INCORRECT DEFINITION OF "BONA FIDE DISPUTE" AS USED IN SECTION 303 OF THE BANKRUPTCY CODE AND AS A RESULT WRONGFULLY GRANT RESPONDENTS' PETITION FOR INVOLUNTARY BANKRUPTCY?

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In re Rimell, 121 B.R. 253 (E.D. Mo. 1990).

In re Rimell, 946 F. 2d 1363 (8th Cir. 1991).

JURISDICTION

Petitioners seek review of the decision of the United States Court of Appeals for the Eighth Circuit in this case filed October 15, 1991. The Eighth Circuit's decision affirmed the Order of the United States District Court, Eastern District of Missouri, Eastern Division filed November 15, 1990. The District Court's Order affirmed the Judgment and Order of the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division entered on February 5, 1990 and the Court's order of March 7, 1990.

On February 25, 1992, this Court issued an Order granting petitioners an extension of time until April 1, 1992 to file with this Court a petition for a writ of certiorari.

Jurisdiction is conferred on this Court under Article 28, Section 1254(1) of the United States Code.

STATUTE INVOLVED

Title 11, Section 303 of the United States Code (Bankruptcy Code)

Section 303. Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title--

> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $45,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims;

(3) if such person is a partnership--

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

I. Facts Leading Up to the Involuntary Bankruptcy Petition.

Throughout the 1980s Albert and Harriet Rimell along with several of their associates operated business entities involved in real estate investment. Pursuant to this activity, several banks extended loans to these various entities. All of the loans were personally guaranteed by various combinations of the alleged debtors. Each of these loans consisted of a one year renewable note secured by the property into which the funds were invested.

In order for Mr. and Mrs. Rimell and their associates to continue to operate their investment companies it was essential that the banks renew or extend the terms of the loans on a yearly basis. Indeed, for several years the banks continued to extend the terms of the loans as each came due.

In 1988, two of the banks, Mercantile Bank and Boatmen's Bank, demanded payment on several of the notes and proceeded to bring civil suits on these notes in the Circuit Court for the County of St. Louis, State of Missouri. In response, the alleged debtors denied liability on the grounds that the banks had made express oral promises to renew the notes until the property was sold and further that through a course of dealing the banks had implicitly promised to extend the terms of the notes.

Prior to filing the petition for involuntary bankruptcy, Mercantile Bank moved for summary judgments on several of the notes, but the state court denied the motions. See, Appendix ("App.") at A-81 - A-83 for copies of these rulings.

Shortly after the Bankruptcy Court issued its order for relief in this case, Boatmen's Bank moved the state court for

summary judgment in the suit on the notes. This motion was denied as well. App. at A-84.

II. Bankruptcy Court Proceedings.

On October 18, 1989, four banks, Mark Twain Bank, First Bank, Boatmen's National Bank of St. Louis and Mercantile Bank National Association filed, pursuant to 11 U.S.C. Section 303(b)(2), an involuntary Chapter 7 petition in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division against Mr. Rimell and three of his associates. That same day, two banks, Mark Twain Bank and First Bank filed an involuntary Chapter 7 petition in the same court against Mrs. Rimell. The Court took jurisdiction over the subject matter of the proceedings pursuant to 28 U.S.C. Sections 151, 157, 1334 and Local Rule 29.

The alleged debtors raised several defenses to the petitions, including the

defense that the creditors did not have standing under Section 303 of the Bankruptcy Code because there existed a bona fide dispute as to each of their claims. Specifically, the alleged debtors offered the same defenses that had successfully defeated the summary judgment motion in the state court - that the banks had agreed to renew the notes both through express oral agreements and through course of dealing.

Mrs. Rimell also presented the separate defense that she had more than eleven creditors, and since Section 303(b)(2) permits two petitioning creditors to prevail only when a debtor has fewer than eleven creditors, the petition should be denied.

At trial, Mr. Rimell testified that he and representatives of the banks had made explicit oral agreements that the banks would renew the notes as they came due. Further, the alleged debtors presented evidence as to

the prior course of dealings with the banks regarding renewal of the notes, which indicated that the banks would continue to deal with the alleged debtors as they had in the past. See, In re Rimell, 111 B.R. 250, 258-259 (Bankr. E.D. Mo. 1990); App. A-31 - A-37.

As to her separate defense Mrs. Rimell presented at trial evidence indicating that she had twenty two creditors at the time the petition had been filed.

The Bankruptcy Court entered its Memorandum Opinion and Order on February 5, 1990. In re Rimell, 111 B.R. 250; App. A-1. In its opinion the court granted relief against the alleged debtors. The court stated that there was no evidence to confirm Mr. Rimell's testimony regarding the oral agreements to extend the terms of the notes as each of the bank's denied that it had made such oral agreements. Rimell, 111 B.R. at

258; App. at A-35. Further, the court decided that each of the previous extensions of the terms of the notes had been a separate transaction creating a new loan each time. As a result, there could not be a course of dealing established. Rimell, 111 B.R. at 259; App. at A-37.

Thus, the court found that "the parties did not, either orally or through prior course of dealing, agree to alter, extend, or modify . . ." the loans. Id.

The Bankruptcy Court also found that Mrs. Rimell had only six creditors at the time the petition was filed, and thus, two petitioning creditors were sufficient under Section 303(b)(2) of the Code. Rimell, 111 B.R. at 257; App. at A-29.

On March 7, 1990, the Bankruptcy Court entered its Memorandum Opinion and Order denying Mr. and Mrs. Rimell's Motion to Set

Aside and Vacate the Memorandum, Order and Opinion Entered February 5, 1990. App. A-39.

III. Appellate Court Proceedings.

Mr. and Mrs. Rimell appealed the Bankruptcy Court's decision to the United States District Court for the Eastern District of Missouri, Eastern Division on the bona fide dispute issue and the number of creditors issue. While the appeal was pending, a third bank, Pioneer Bank, moved the Bankruptcy Court to join as a petitioning creditor as to Mrs. Rimell. Although Section 303 (c) of the Bankruptcy Code specifically requires that a joining petitioner must move to join prior to the ordering of relief by the Bankruptcy Court, the court allowed Pioneer bank to join as a petitioning creditor. As a result, the District Court found the issue as to the number of Mrs. Rimell's creditors to be moot. In re Rimell, 121 B.R. 253, 257 (E.D. Mo. 1990); App. A-53,

A-65. Nevertheless, the District Court upheld the Bankruptcy Court's findings as to the number of creditors Mrs. Rimell had. Id.

Moreover, the District Court affirmed the Bankruptcy Court's decision on the issue of whether a bona fide dispute existed as to the creditors' claims. Rimell, 121 B.R. at 256; App. at A-63.

The Rimells appealed to the United States Court of Appeals for the Eighth Circuit on all issues. On October 15, 1991, the Eighth Circuit affirmed the District Court's decision. In re Rimell, 946 F.2d 1363; App. A-67. It found that no "bona fide dispute" existed. Rimell, 946 F.2d at 1366; App. at A-76. Further, it found that the issue of the number of Mrs. Rimell's creditors was moot because of the addition of the third petitioning creditor. In passing, the court mentioned that it found no error in

the Bankruptcy Court's method of counting Mrs. Rimell's creditors. Id.

Mr. and Mrs. Rimell now petition this Court to issue a writ of certiorari to the Eighth Circuit Court of Appeals and to review the Eighth Circuit's decision in this case.

ARGUMENT

I. Introduction.

Congress amended the Bankruptcy Code in 1984 so that only a creditor with a claim not subject to a "bona fide dispute" could join in instituting an involuntary bankruptcy proceeding. The goal of this legislation was to preclude a creditor from wielding the threat of bankruptcy as a "club" to coerce an alleged debtor into forfeiting his legitimate and good faith disputes as to his liability.

Unfortunately, Congress did not supply a definition of "bona fide dispute," resulting in differing and conflicting definitions in the various jurisdictions. However, under virtually all of the definitions supplied to date, bankruptcy courts are not to determine the outcome or even the likely outcome of the "bona fide dispute," but merely whether such a dispute exists. If a "bona fide dispute"

exists, it is left to the state court to determine the outcome.

In this case, the Bankruptcy Court reached conclusions of law and fact as to the outcome of the alleged debtors' dispute over their liability on the creditors' claims. Based on this determination, the Bankruptcy Court found that a "bona fide dispute" did not exist. This methodology circumvents congressional intent and conflicts with the decisions of each of the Circuit Courts which have addressed this issue.

II. History of the 1984 Amendments.

Under the Bankruptcy Code of 1898, a creditor generally could not qualify as a petitioning creditor in an involuntary bankruptcy where there was a dispute as to the creditor's claim against the debtor.

Section 59b of the 1898 Act provided that "[t]hree or more creditors who have

provable claims not contingent as to liability . . . may file a petition. . . ."

For a claim to be "provable" it had to be "alive [and] potentially enforceable. . . ." 1 H. Remington, a Treatise on the Bankruptcy Law of the United States 308-9 (1950). Thus, holders of disputed claims were generally prevented from becoming petitioners in an involuntary bankruptcy. In re All Media Properties, Inc., 5 B.R. 126, 133 (S.D.Tex 1980).

In 1978, Congress amended the requirements under the Act so that courts found that even holders of disputed claims could often become petitioning creditors. The courts looked to Section 303(b)(1) and Section 101(4) to reach this conclusion. Section 303(b)(1) gave any holder of a claim that was not contingent as to liability the right to be a petitioning creditor.

Section 101(4) defined "claim" as:

> [A] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. . . .

Thus, holders of disputed claims often were allowed to be petitioning creditors. In re Dill, 731 F.2d 629 (9th Cir. 1984); In re B.D. International Discount Corp., 701 F.2d 1071 (2nd Cir. 1983); cert. denied, 464 U.S. 830, 104 S.Ct. 108; Matter of Covey, 650 F.2d 877 (7th Cir. 1981).

Allowing holders of disputed claims to force alleged debtors into bankruptcy allowed creditors to use the threat of bankruptcy as leverage to force alleged debtors to forsake their defenses and pay creditors even where there was a good faith dispute as to liability. In response to this patently inequitable status of the law, Congress waited only six years before again amending

Section 303 of the Code through the Bankruptcy Amendments and Federal Judgeship Act of 1984.

Thus, Section 303 of the Bankruptcy Code now provides that an involuntary case can only be commenced by the filing of a petition

> by three or more entities, each of which is . . . a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute. . . .

(emphasis added).

In proposing this amendment, Senator Max Baccus of Montana indicated that the amendment was intended to protect debtors by forcing creditors to utilize state courts to attempt to collect disputed debts. The following is a rather long but extremely telling excerpt from a statement by Senator Baccus:

> The problem can be explained simply. Some courts have interpreted Section 303's language on a debtor's general failure to

pay debts as allowing the filing of involuntary petitions and the granting of involuntary relief even when the debtor's reason for not paying is a legitimate and good faith dispute over his or her liability. This interpretation allows creditors to use the Bankruptcy Code as a club against debtors who have bona fide questions about their liability but who would rather pay up than suffer the stigma of involuntary bankruptcy proceedings.
My amendment would correct this problem. Under my amendment, the original filing of an involuntary petition could not be based on debts that are the subject of a good-faith dispute between the debtor and his or creditors. In the same vein, the granting of an order of relief could not be premised solely on the failure of a debtor to pay debts that were legitimately contested as to liability or amount. I believe this amendment although a simply (sic) one is necessary to protect the rights of debtors and to prevent misuse of the bankruptcy system as a tool of coercion. I also believe it corrects a judicial misinterpretation of existing law and congressional intent as to the proper basis for granting involuntary relief.

130 Con. Rec. S 7618, (98th Cong. 2d Sess., June 19, 1984) (emphasis added).

As amended, the Code is intended to prevent creditors from utilizing the bankruptcy courts to enforce disputed claims. Instead, creditors must resort to state courts for a determination of such issues.

Unfortunately, when Senator Baccus proposed his amendment he failed to provide us with a definition of the term "bona fide dispute." Since 1984, bankruptcy courts have grappled with this problem, coming up with varying definitions for the term, none of which is sufficiently definite to be uniformly applied to the myriad "disputed" claims which are dealt with in bankruptcy proceedings. To date, different courts have come up with at least five different definitions of "bona fide dispute."[1] This

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[1] See 2 Collier's on Bankruptcy, para. 303.08; In re Johnston Hawks, LTD., 49 B.R. 823 (Bankr. D. Ha. 1985); In re Stroop, 51 B.R. 210 (Bankr. D. Colo. 1985); In re Lough, 57 B.R. 993 (Bankr. E.D. Mich. 1986); In re Ross, 63 B.R. 951 (Bankr. S.D.N.Y.

Court now has before it the opportunity to clear up the confusion surrounding the definition of "bona fide" dispute and bring uniformity to the application of Section 303.

III. The Objective and Subjective Definition of "Bona Fide Dispute."

The Bankruptcy Court for the District of Hawaii was one of the first to address the definition of "bona fide dispute" when it decided In re Johnston Hawks, Ltd., 49 B.R. 823 (Bankr. Ct. D. Ha. 1985). The court defined "bona fide dispute" as

> a conflict in which an assertion of a claim or right made in good faith and without fraud or deceit on one side is met by contrary claims or allegations made in good faith and without fraud or deceit on the other side.

Id. at 830.

The court then went on to list four factors which it would analyze in determining

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1986); In re Hope Communication, Inc., 59 B.R. 939 (Bankr. W.D. La. 1986).

whether claims were subject to a bona fide dispute.

> 1. The nature of the dispute.
>
> 2. The nature of the extent of the evidence and allegations presented in support of the creditor's claim and in support of the debtor's contrary claims.
>
> 3. Whether the creditor's claim and the debtor's contrary claims are made in good faith and without fraud or deceit.
>
> 4. Whether on balance the interests of the creditor outweighs (sic) those of the debtor.

Id. at 831.

This is both an objective and a subjective analysis, looking toward the validity of the claims involved, the good faith intentions of the parties and the interests of the parties. The roots of this analysis lie in pre-1984 case law.[2]

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[2] These include: In Matter of Covey, 650 F.2d 877 (7th Cir. 1981) where the court held that a disputed debt should be excluded where: 1. the dispute was whether any claim

The main criticism of this approach is on its subjective side. By examining whether the creditor's and debtor's conflicting claims are in good faith and without fraud or deceit, the court allows parties who believe in good faith in their bad claims to prevail. In re Lough, 57 B.R. 993 (Bankr. E.D. Mich. 1986). This would seem to reward ignorance.

On the other hand, by determining whether on balance the creditor's interests outweigh the debtor's, a court is able to examine whether a creditor will be prejudiced by being forced to resort to a state court to litigate his claim. If a creditor will not

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existed, not merely regarding the amount of the claim; 2. the dispute could be examined without substantial litigation of legal or factual questions; and 3. the interest of the debtor in defeating an order of involuntary bankruptcy outweighed creditors' interests in achieving a somewhat more rapid determination of the involuntary; and In re Dill, 731 F.2d 629 (9th Cir. 1984) where the court utilized a simple balancing test balancing the interests of the creditor against those of the debtor. Johnston Hawks, 49 B.R. at 830.

be prejudiced by litigating in state court then it is more likely that the bankruptcy proceeding was utilized by the creditor as a weapon to force the alleged debtor to forego his defenses and pay his disputed debt. Preventing a creditor from exerting such pressure would seem to further the purpose of the 1984 amendments as articulated by Senator Baccus.

Interestingly, the court in In re Lough argues that it is improper to give consideration to the balance of interests as between the creditor and the debtor as there is no basis for it in the statute as amended. Id. at 996. However, this seems to ignore the very purpose for which the Act was amended - to allow the creditor to protect his interests through the use of the Bankruptcy Court without allowing him to utilize the court as a means of coercion. Hence, a determination as to what degree it

is essential in a particular case that a creditor have access to the Bankruptcy Court would seem a worthy endeavor.

IV. The Summary Judgment Definition of "Bona Fide Dispute."

Within months after the Bankruptcy Court in Hawaii issued its subjective and objective definition of "bona fide dispute" in Johnston Hawkes, the Bankruptcy Court in Colorado, in In re Stroop, 51 B.R. 210 (D. Col. 1985) came up with a completely objective definition. The court, providing no reasoning for its decision, concluded that, when determining whether a claim was subject to a bona fide dispute, it would be appropriate to apply the same standard applicable to motions for summary judgment:

> If the defense of the alleged debtor to the claim of the petitioning creditor raises material issues of fact or law so that a summary judgment could not be rendered as a matter of law in favor of the creditor on a trial of

> the claim, the claim is subject to a bona fide dispute.

Id. at 212.

This standard is not without its critics. The court in In re Lough, 57 B.R. 993 pointed out that under the summary judgment test, if there is a substantial dispute as to the proper application of law but no substantial issue of fact, Stroop might require the court to resolve the question of law as if on a motion for summary judgment and simply determine whether the alleged debtor is liable to the creditor. Id. at 997. This conflicts with Congressional intent because it requires the court to make a determination of the merits of the alleged debtor's defense and not simply whether a bona fide dispute exists. Id. As the Lough court states, "The legislative history makes it clear that Congress intended to disqualify a creditor

whenever there is any legitimate basis for the debtor not paying the debt, whether that basis is factual or legal." Id. at 997.

V. The Modified Summary Judgment Definition of "Bona Fide Dispute."

Less than a year after the Stroop decision, the Bankruptcy Court in the Eastern District of Michigan came up with yet another definition of "bona fide dispute." Criticizing the Johnston Hawks and Stroop decisions as discussed above, the court came up with a new standard:

> [I]f there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts, then the petition must be dismissed.

Lough, at 997.

The court emphasized that "in deciding whether there is a bona fide dispute, it must not resolve any genuine issues of fact or law." Id.

This formulation would seem to be the same summary judgment standard of Stroop liberalized in favor of alleged debtors so as to ensure that courts do not issue rulings of law as to the debtor's defenses.

The Seventh Circuit Court of Appeals adopted the Lough approach in In re Busick, 831 F.2d 745 (7th Cir. 1987) stating:

> Under this standard, the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt. However, the "[t]he statute does not require the court to determine the outcome of any dispute, only its presence or absence. Only a limited analysis of the claims at issue is necessary."

Id. at 750 (emphasis added).

VI. The "Glossed" Modified Summary Judgment Definition of "Bona Fide Dispute."

The standard enunciated in Lough and followed in Busick was adopted in the Third Circuit in B.D.W. Associates, Inc. v. Busy Beaver Building Centers, Inc., 865 F.2d 65

(3rd Cir. 1989). However, the court in B.D.W. misread the Busick decision and as a result added a "gloss" to the Lough and Busick standards which significantly altered the definition in favor of creditors. The court misquoted Busick as stating that substantial factual and legal questions had to be raised by the debtor to preclude a finding of involuntary bankruptcy. B.D.W. at 66-67. However, in reality what the court in Busick had done was, when applying the "bona fide dispute" standard to the facts of its case, quoted the trial court as having found that the debtor had raised "substantial legal questions regarding each of the creditors' claims" thus proving the existence of a bona fide dispute. Busick at 750. The Seventh Circuit was not indicating that the debtor had to prove the existence of "substantial legal and factual questions" regarding the creditor's claim in order to show the

existence of a bona fide dispute, but merely that in that particular case the debtor had raised such questions and so therefore clearly had shown that a bona fide dispute existed. Certainly, there is no indication that the court in Busick intended to add a "gloss" to the Lough formulation.

Still, the Third Circuit, by adding its "gloss" requiring that a debtor show "substantial" factual and legal questions, increased the debtor's burden.

VII. The Eighth Circuit has Professed to have Adopted the "Glossed" Modified Summary Judgment Definition of "Bona Fide Dispute" but Actually has Adopted a Definition That Requires a Determination of the Disputed Claim.

The Eighth Circuit in this, its first case dealing with the definition of "bona fide dispute," has professed to have adopted the Third Circuit's "glossed" version of the standard enunciated in Lough and Busick. Indeed, the Bankruptcy Court also professed

to have applied the Lough standard. Yet, it is evident that when the Bankruptcy Court went through the process of determining whether a bona fide dispute existed in this case, it did not apply the Lough standard. Moreover, it is clear from the Circuit Court's discussion of its reasons for affirming the trial court's decision, that, although it has professed to have adopted the Lough standard, it actually has adopted a much more stringent one.

A. The Bankruptcy Court Did Not Merely Determine If a Bona Fide Dispute Existed But Instead Reached Conclusions of Law and Fact as to the Validity of the Alleged Debtors' Defenses to the Creditors' Claims.

Mr. and Mrs. Rimell and three of their associates in the real estate investment business were forced into involuntary bankruptcy by four creditor banks who had made loans to various entities with which the alleged debtors were associated. Each of the

loans was personally guaranteed by various combinations of the debtors. The loans were one year renewable notes secured by the real estate into which the funds were invested. Obviously, to be viable, it was essential that the banks renew or extend the terms of the loans every year in order to keep the business afloat.

Although the creditor banks extended or renewed many of the loans several times, at some point they decided to demand payment in full on them. In fact, two of the creditor banks, Mercantile Bank and Boatmen's Bank, filed suits in state court to collect on several of the notes. However, instead of attempting to follow through with their efforts to sue on the notes in state court, the creditor banks, on October 18, 1989, filed a petition in the Bankruptcy Court for the Eastern District of Missouri, Eastern

Division to force Mr. and Mrs. Rimell and their associates into involuntary bankruptcy.

In both the state court action and the bankruptcy court action, the alleged debtors put forth the same defense - that the banks, through course of dealing and express oral agreement, had agreed to continue extending the terms of the loans until the property was sold. Indeed, the state court was sufficiently satisfied with the evidence presented by Mr. Rimell and his associates as to this defense that it refused to grant Mercantile Bank summary judgments on its claims.

In the bankruptcy action, Mr. and Mrs. Rimell and the other alleged debtors objected to the bank creditors' standing on the basis that a bona fide dispute existed as to the banks' claims. The alleged debtors presented evidence of the state court's rejection of Mercantile Bank's motions for summary

judgment, Mr. Rimell's testimony as to the creditors' express oral agreements and evidence of the banks' past histories of renewing the loans creating a course of dealing. The Bankruptcy Court, without indicating which definition of "bona fide dispute" it was applying, ruled against the alleged debtors and found that no bona fide dispute existed.

As to the alleged debtors' claims that the banks had made express oral agreements to renew the loans, the Bankruptcy Court preferred to believe the testimony of the banks' representatives over that of Mr. Rimell.

> Albert Rimell testified that each Creditor orally agreed, at the time of the loan transaction, that it would extend the terms of the loan, lower the rate of interest, or amend the loan with terms more favorable to the alleged Debtors . . . [T]here is no evidence to

> confirm that the parties ever agreed to such terms.

Rimell, 111 B.R. at 258, App. A-35.

As to the course of dealing argument, the Bankruptcy Court found that each of the loan renewals created a new loan transaction and thus there could be no course of dealing established by such independent transactions. Rimell, 111 B.R. at 259; App. at A-37.

In conclusion, the Bankruptcy Court stated:

> [T]he parties did not, either orally or through prior course of dealing, agree to alter, extend or modify the existing written contractual terms on any of the loans in the instant case. Given that the parties did not agree to such terms, it follows that there could be no bona fide dispute.

Id.

Clearly, in order to reach its decision, the Bankruptcy Court found it appropriate to reach conclusions of fact and law - who to believe and who not to believe - what

constitutes a course of dealing and what does not.

If the Bankruptcy Court had been applying the Lough standard, it would never have reached this determination. It is clear that under Lough, it is a bankruptcy court's role to determine whether a "bona fide dispute" exists, not what the outcome or likely outcome of such a dispute will be.

In its subsequent denial of Mr. and Mrs. Rimell's Motion to Set Aside and Vacate, the Bankruptcy Court for the first time professed to have applied the Lough modified summary judgment definition of "bona fide dispute."

Although specifically recognizing that under Lough it was required only to determine whether a bona fide dispute existed, the Bankruptcy Court nevertheless once again made a determination as to the outcome of the dispute.

The Bankruptcy Court stated:

> Upon reviewing the evidence, this Court cannot determine, using an objective standard, that a bona fide dispute existed because neither the newly submitted evidence nor any of the Debtors' evidence proves the existence of an agreement to renew or modify the terms of the loans between the parties.

A-50 - A-51 (emphasis added).

The key word here is "proves." The Bankruptcy Court placed a burden on the alleged debtors to "prove" the existence of an agreement to renew or modify the terms of the loans. But this is much too stringent of a standard. The alleged debtors should merely have been required to show that there existed a bona fide dispute as to whether an agreement to renew or modify the loans was reached, not that there was such an agreement. Submitting evidence indicating that such agreements existed should have been sufficient.

In reviewing the Bankruptcy Court's decision, the District Court for the Eastern District of Missouri, Eastern Division, also professed to have adopted the Lough standard. Citing Busick, the District Court stated that "the Bankruptcy Court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt." Rimell, 121 B.R. at 256; App. at A-63 (emphasis in original).

The District Court pointed out that the Bankruptcy Court had found that there had been no oral agreement or course of dealing and thus affirmed the Bankruptcy Court's decision.

B. The Eighth Circuit Has Adopted a Definition of "Bona Fide Dispute" That Requires the Bankruptcy Court to Determine the Validity of an Alleged Debtor's Defenses Rather Than Merely Determining If a Bona Fide Dispute Exists.

The Eighth Circuit Court of Appeals, in affirming the District Court's decision, also

professed to have adopted the Lough definition of "bona fide dispute" as "glossed" by Busick. In articulating the definition of "bona fide dispute" to be applied in the Eighth Circuit the court stated:

> This does not mean that the bankruptcy court is totally prohibited from addressing the legal merits of the alleged dispute; indeed, the bankruptcy court may be required to conduct a limited analysis of the legal issues in order to ascertain whether an objective legal basis for the dispute exists. Busick, 831 F.2d at 750. Finally, because the determination as to whether a dispute is bona fide will often depend (as it did in this case) upon an assessment of witnesses' credibilities and other factual considerations, the bankruptcy court's determination in this regard is a factual finding. . . .

Rimell, 946 F.2d at 1365; App. at A-74 (emphasis added).

Petitioners do not propose that the determination of the existence of a bona fide

dispute should be a conclusion of law. However, the "factual finding" should be confined to a determination by the court as to whether a bona fide dispute exists, not the likely outcome of the dispute. The "limited analysis of the legal issues" should be limited to an analysis of whether there is a dispute as to the legal ramifications of the facts presented, not what the law on the disputed subject is.

There is a clear implication in this portion of the Eighth Circuit's opinion that the Bankruptcy Court is obligated to weigh the evidence, including the credibility of witnesses, review the law, and then reach a conclusion of law and fact as to the likely result of the dispute. In reality neither conclusions of law nor fact should be reached or even approached. Analyzing issues of law and fact in this case was the equivalent of

resolving the dispute.

Indeed, the Court of Appeals affirmed the Bankruptcy Court's decision citing the Bankruptcy Court's conclusion that "the parties did not . . . extend or modify the existing written contractual terms on any of the loans. . . . Rimell, at 1366, App. at A-75, A-76.

It is precisely this type of conclusory finding of fact that is prohibited under any definition of "bona fide dispute."

Whatever definition of "bona fide dispute" is applied to the present case - whether it be the Stroop summary judgment standard, the Lough modified summary judgment standard, or even the "glossed" modified summary judgment standard - it is clear that a bona fide dispute existed.

A Missouri state court had already denied summary judgments to Mercantile Bank in its attempt to collect on loans parallel

to the ones at issue here. Moreover, Mr. Rimell testified at trial that the banks had agreed to extend the loans. If the Bankruptcy Court had applied the Stroop standard, this evidence should have been sufficient to show that a bona fide dispute existed.[3] The Lough standard is almost identical to the Stroop standard except that on issues of law it is more helpful to the alleged debtor. Thus, if the Bankruptcy Court had applied the Lough standard correctly, it should have found that a bona fide dispute existed as to whether there existed agreements to renew the loans. Instead, the Bankruptcy Court reached

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[3] Indeed, one of the creditors, Boatman's National Bank of St. Louis, subsequent to the Bankruptcy Court's entry of relief, was denied in its motion for summary judgment on one of the debts that was the subject of the original Petition. See App. at A-84.

its own conclusions of law and fact as to the validity of the creditors' claims, in effect resolving the dispute in favor of the creditors.

Thus, the Eighth Circuit by affirming the trial court allowed to happen exactly what Senator Baccus was attempting to prevent when he proposed the 1984 amendments to Section 303 of the Bankruptcy Code. The creditor banks, realizing that they could not win summary judgment in state court, utilized the Bankruptcy Court as a shortcut to their goal. The creditor banks ran to the Bankruptcy Court for relief, where they found a court more cooperatively willing to make determinations of fact and law as to the validity of the banks' claims.

If the Eighth Circuit's interpretation of the Lough standard is allowed to stand, more and more creditors will be running to

the friendly confines of federal bankruptcy court in order to enforce their claims. The coercion that Senator Baccus attempted to prevent will creep back into the Bankruptcy Code.

Only by adopting a strict version of the Lough modified summary judgment definition of "bona fide dispute" can this Court enforce Congressional intent and protect alleged debtors from the strong arm tactics of overreaching creditors.

CONCLUSION

For these various reasons, Petitioners respectfully request that this Petition for Writ of Certiorari be granted, and this case be set for argument to determine if this

Court should reverse the Bankruptcy Court's decision.

Respectfully submitted,

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